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No. 457

IN THE

Supreme Court of the United States

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, and HARRY IMEL,
Petitioners,

v.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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The brief in opposition filed by respondents is largely devoted to an argumentative recital of alleged facts in the case, many of which are not relevant to the issues presented by the petition and which serve to obscure rather than clarify those issues. Of the numerous erroneous and incomplete statements made by respondents, we shall discuss here only those believed to

be germane to the legal issues presented and to the ultimate question whether the writ of certiorari should be granted.

I. The Improper Reference of the Entire Case to Special Master Doerr

In the petition it is pointed out that the "entire cause" was referred to Special Master Doerr and that this referral constituted an abdication of the trial court's responsibility (Pet. 5-6, 13-17). *La Buy* v. *Howes Leather Co.*, 353 U.S. 249. The brief in opposition creates several misleading impressions as to the critical facts with respect to this reference. By treating the reference as a continuation of the earlier, carefully limited reference to another master (to which petitioners consented) respondents imply that petitioners consented to the second reference (Brief in Opp. 2, 16). The fact is that petitioners never consented to the second reference; they repeatedly challenged it both through their counsel of record and *pro se* (Pet. 6-7).[1]

The statement of respondents that it "was not until after the master had recommended dismissal

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[1] Respondents erroneously imply (Brief in Opp. 12, note 7) that petitioners did not include in their *pro se* pleadings a specific attack upon the order appointing Master Doerr, but merely sought to expunge some 18 orders. Thus respondents say that petitioners are operating "on the apparent theory that this order [i. e., the order of reference of September 21, 1955 (R. 48)] was one of the 18 orders [requested to be expunged] and would have been affected by the mass 'expunging' proposed by Strong" (Brief in Opp. 12). In fact, petitioners explicitly objected to the order of reference (R. 93, paragraph 12) as pointed out in the petition (Pet. 7). In any event, the pleading was not stricken for lack of specificity but in purported enforcement of the master's order which limited petitioners to utterances through their attorneys of record (R. 103, 106).

of the action that plaintiffs moved the Court to vacate the appointment" (Brief in Opp. 16) is also misleading. It overlooks or disregards the repeated objections to the master's jurisdiction filed with the master and his repeated rulings that participation in the proceedings before him would *not* be construed as a waiver of objections to his appointment (Pet. 7). It overlooks or disregards the *pro se* pleading filed with the court on October 17, 1955 (Pet. 7; R. 89, 93; see note 2, *infra*) some months before the master purported on his own authority to dismiss the entire law suit as to two of the petitioners (December 22, 1955, R. 115).

Finally, respondents state that "When plaintiffs at length indicated to the Court that they construed the appointment order as affecting their right to trial by jury, the District Judge *promptly* issued an order negativing this view" (Brief in Opp. 16-17; emphasis added). This statement is based upon the respondents' persistent error in overlooking the *pro se* pleading of October 17, 1955 which explicitly indicated to the trial court that petitioners construed the appointment order as affecting their right to trial by jury.[2] And respondents neglect to point out that the judge's order purporting to interpret the order of reference was issued in January 1956 (Supp. R. 125) just before the final dismissal of the action and after the

[2] "That said Order appointed a new Master to pass upon findings of fact and conclusions of law and called for the payment of certain moneys and allowed a special master to pay out certain sums; that said Order was in derogation of plaintiffs' rights in that there was no provision for examination into the qualifications of the Special Master; in that it granted to a Special Master certain determinations which are reserved for a jury, and the plaintiffs, in this action, had requested a jury action" (R. 93).

master had proceeded under his sweeping delegation of plenary authority for several months (Pet. 6, 15).

Acting in reliance upon the express reference to him of the "entire cause" (R. 50), Master Doerr in effect tried the petitioners for misconduct and issued an unqualified order of dismissal with respect to some of them (R. 115). Moreover, he denied petitioners access to the district court (except through their openly hostile counsel of record) and directed the clerk of the court to strike physically from the files the *pro se* pleadings filed by petitioners (R. 106) even though those pleadings sought relief from the court against orders of the master (e.g., R. 86, 93).

In sum, the facts stated in the petition with respect to the reference to Master Doerr are correct. The trial court improperly delegated to the master its judicial duty of supervision of the pre-trial proceedings. The unfortunate events which led to the dismissal of this action flowed directly from that improper reference. For the reasons stated in the petition for certiorari (pp. 13-17), and in conformity with the policy of *La Buy* v. *Howes Leather Co.*, 353 U.S. 249, the judgment should be reversed.

II. The Impairment of Petitioners' Right to Effective Counsel

The central fact in this case is that petitioners were denied the right to discharge openly disloyal attorneys of record unless they first paid $200,000 in attorneys' fees (Pet. 7-10, 17-20). In the petition it was pointed out that the opinion of the Court of Appeals is silent with respect to the overt misconduct of petitioners' attorneys of record (Pet. 18), although much of that misconduct occurred on the record through utterances of those attorneys.

The brief in opposition, too, is silent on this critical point. Respondents have not undertaken to defend the astonishing behavior of petitioners' attorneys of record in publicly charging their clients with fraud, perjury and other misconduct (e.g., R. 57, 59, 62; Pet. 7-8, 10, 18) while insisting upon the right to continue to represent them. Respondents presumably recognize that such conduct cannot be defended.

Respondents erroneously suggest that petitioners had other attorneys available to represent them. Thus it is said that they "were at all times represented" by the undersigned attorney (Brief in Opp. 18). The fact is that the undersigned attorney never appeared of record in this proceeding until it had been finally terminated in the district court. He first appeared in connection with the filing of the notice of appeal from the judgment of dismissal (R. 156) and prior to entry of that judgment neither advised nor was consulted with respect to petitioners' controversy with their attorneys of record or with respect to the deposition proceedings or issues arising in those proceedings.

Any attempt to represent petitioners by attorneys other than the hostile attorneys of record would have been confronted with the master's order of October 5, 1955 precluding such representation except on onerous conditions (R. 70-71). Under the explicit order of Master Doerr, to whom the entire case had been referred (Pet. 5), only pleadings signed by *attorneys of record* could be filed.[3] Pursuant to Rule 5

[3] "No pleading or motion which may be tendered by plaintiffs for filing and which shall not be signed by an attorney of record for plaintiffs in accordance with the above cited rules shall be filed or received by the Clerk, except as may be specifically provided by my later order or by order of the court" (R. 106).

of the rules of the district court (Pet. 9, note 6), neither the undersigned counsel nor any other member of the law firm which appeared "of counsel" on the complaint (R. 22) qualified as an attorney of record while the case was pending before the district court. Petitioners' only attorneys of record were the hostile attorneys whom petitioners had unsuccessfully sought to discharge. Thus petitioners were without attorneys entitled to appear for them and in whom they had confidence, and they were not permitted (without payment of oppressive fees) either to obtain new counsel or to represent themselves. Indeed, even the pleading filed by the petitioners *pro se* in an effort to obtain review of the master's order on the motion to remove attorneys was ordered stricken (R. 86, 106).

In the light of the open disloyalty of the attorneys of record, the conduct of petitioners in failing to make the required deposit and to testify further in the deposition proceedings was both understandable and excusable, as is pointed out in the petition. The brief in opposition conveys a picture of repeated and wilful defaults by petitioners in failing to appear to present their position before the master and the court. The record, however, establishes that petitioners diligently attempted to present that position (e.g. Pet. 10, 11; R. 3, 5, 7, 11, 32, 41, 50, 86, 89). It is true that they failed to appear at the hearing on removal of their attorneys at a time when as the master was aware, they were seeking interlocutory relief from the Court of Appeals (Pet. 8). Shortly thereafter, they were barred from representing themselves by the master's order (R. 106), and their personal presence at subsequent proceedings (other than those at which they were directed to be present) served

no useful purpose.[4] They were not required legally or otherwise to be present in person and thus give tacit acquiescence to representation by attorneys whom they had been effectively prevented from discharging. Had they been present, they would have been forced to sit by in silence while their attorneys of record made statements contrary to petitioners' interests. (See Appendix, *infra* p. 1a.)

Petitioners found themselves in an impossible position as a direct result of the actions of the district court and the special master to whom the trial judge unlawfully delegated his judicial responsibilities. The trial court and master not only deprived petitioners of their right to loyal counsel in whom they had confidence; petitioners were effectively compelled to be represented by openly disloyal counsel. The court below has sanctioned an inroad upon the constitutional right of counsel, apparently on the implicit premise that it is more important that lawyers be able to compel payment of compensation for past legal work than that parties be allowed to obtain effective legal representation. The question presented is vital to the administration of justice. It should be definitely resolved by this Court.

[4] Thus, at one subsequent hearing in which petitioner Strong attempted to explain his position, the master ordered that "All statements made by Harry J. Stron[illegible] the course of this hearing, except the fact of his presence here, will be stricken from the record and will be given no effect" (R. 7).

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari, the writ should be granted.

Respectfully submitted,

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